Office-Supreme Court, U.S.
FILED
MAY 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-940

In the Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE WOMEN'S BAR ASSOCIATIONS OF ILLINOIS AND NEW YORK

PADDY HARRIS McNAMARA*
SUSAN N. SEKULER
JACQUELINE S. LUSTIG
33 N. Dearborn
Chicago, Illinois 60602
312-630-0075

* Counsel of Record

May 6, 1983

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

Interest of Amici 2

Women's Bar Association of Illinois 2

Women's Bar Association of the State of New York 3

Statement Of The Case 4

Summary Of Argument 5

Argument 8

I. Standard Methods Of Statutory Analysis, Correctly Applied, Support Reversal 8

A. The Plain Language of the Statute Supports the Application of Title VII to Partnership Decisions 8

B. The Legislative History Indicates that Congress Intended to Include the Professions in Title VII 9

C. The Eleventh Circuit Decision is at Odds with Emerging Lower Court Trends and Authority 12

D. The Analysis of Burke v. Friedman Was Misapplied By the Eleventh Circuit 15

II. Public Policy Mandates Protection Of Professionals Employed By Partnerships 17

III. The Effects Of Permitting Sex Discrimination Would Be Pernicious And Pervasive 18

Conclusion 21

TABLE OF AUTHORITIES

Cases

PAGE

Bates v. State Bar of Arizona, 433 U.S. 350 (1976) 17, 18

Blank v. Sullivan & Cromwell, 418 F.Supp. 1 (S.D. N.Y. 1975) 5, 12

Bonilla v. Oakland Scavenger Corp., ... F.2d ....., 51 U.S.L.W. 2301 (9th Cir. 1982) 6, 13

Bradwell v. State, 16 Wall. 130 (1872) 3

Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) ..6, 15, 16

Calderon v. Martin County, 639 F.2d 271 (5th Cir. 1981) 8

Cornelius v. Benevolent Protective Order of Elks, 382 F.Supp. 1182 (D. Conn. 1974) 17

County of Washington v. Gunther, 452 U.S. 161 (1981) 7, 17

Gomez v. Alexian Brothers Hospital, 698 F.2d 1019 (9th Cir. 1983) 6, 12

Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982) 7, 12

Kohn v. Royall, Koegal & Wells, 59 F.R.D. 515 (S.D. N.Y. 1973) *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974) 5, 12

Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123 (S.D.N.Y. 1977) 5, 12

NLRB v. Hendricks County Rural Electric Membership Corp., 450 U.S. 964 (1981) 6, 14

Pao v. Holy Redeemer Hospital, 547 F.Supp. 484 (E.D. Pa. 1982) 13

PAGE

Puntalillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (D.N.H. 1974) 6, 13

Silby Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1970) 6, 13

Stanton v. Stanton, 421 U.S. 7 (1975) 18

Udall v. Tallman, 380 U.S. 1 (1965) 14

U.S. v. Moore, 95 U.S. 760 (1898) 14

Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) 14

Statutes

42 U.S.C. §§2000e *et seq.* (1976 & Supp. IV 1980) ..... *Passim*

20 U.S.C. §§1134 *et seq.* (Supp. IV 1980) 19

Books

A. Bromberg, *Crane and Bromberg On Partnership* (1968) 16

C. Epstein, *Women in Law* (1981) 19

J. Stewart, *The Partners* (1983) 19

Sullivan's Law Directory For The State of Illinois 1982-83 (1982) 19

Articles

Bartholet, *Application of Title VII To Jobs In High Places*, 95 Harv.L.Rev. 947 (1982) 17

Block, *Women Build Own Stature as Architects*, Lerner Booster, March 2, 1983 at 1 20

PAGE

Note, *Applicability of Federal Anti-Discrimination Legisatlon to the Selection of A Law Parner*, 76 Mich.L.Rev. 282 (1977) 17

SOM Names Dianne Legge Lohan First Woman General Partner, 4 Chicago Women in Architecture, June 1982, at 2 20

Wayne, *The Year of the Accountant*, N.Y. Times, Jan. 3, 1982 (Business Section) 20

Other

EEOC Brief For Plaintiff-Appellant, *Hishon* v. *King & Spalding*, No. 80-9021 (11th Cir. 1982) 15

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-940

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE WOMEN'S BAR ASSOCIATIONS OF ILLINOIS AND NEW YORK

This brief is submitted by the Women's Bar Associations of Illinois and New York (hereinafter Women's Bar Associations) urging that the decision of the Eleventh Circuit be reversed. The issue in this case is whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* protects attorneys employed by law firms from being discharged from their employment or denied admission to the partnership as a result of discrimination on the

basis of their race, color, religion, sex or national origin. Petitioner was discharged from her employment by respondent and was denied membership in the law firm allegedly because of her sex. While this particular employment decision directly affects only these parties, the application of Title VII to the employment of professionals has overriding significance to women, blacks and other minorities. Because of their concern for the structure of the legal profession as a whole and the future of women and other minorities within the profession, the Women's Bar Associations join in filing this brief *amicus curiae* to bring to the attention of this Court the profound social and economic consequences of denying individuals the right to participate fully in the professions on the basis of their individual merit, free from discrimination.

INTEREST OF AMICI

Women's Bar Association of Illinois

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women attorneys and maintaining the honor and dignity of the legal profession. The WBAI has over 700 members who practice in all areas of the law, and whose ages range from newly admitted attorneys in their twenties to attorneys in their eighties who have been in practice over fifty years.

The first major activity of the WBAI was its campaign to secure for women the right to vote. Since its inception, the WBAI has actively monitored and often become involved in matters affecting women in the legal profession, women and women attorneys. Recently, the WBAI has been active in securing fair divorce legislation, ensuring that battered women have legal representation and has

participated as *amicus* in cases involving the rights of women attorneys. Throughout its history, WBAI members have been mindful that in 1872 Illinois resident Myra Bradwell was denied a license to practice law by the Illinois and United States Supreme Courts, for the sole reason that she was a woman. *Bradwell* v. *State*, 16 Wall. 130 (1872).

The members of the WBAI, through personal experience and observation, believe that sex discrimination is still the major obstacle barring full participation by women attorneys in the legal profession.

Women's Bar Association of the State of New York

The Women's Bar Association of the State of New York ("WBASNY") is a membership organization with ten chapters throughout the state. The WBASNY has been involved in major litigation as a force supporting women's rights and fighting to remove the barriers which prevent women from participating fully in American society. The Association is particularly concerned with the status and advancement of women lawyers in the practice of their profession.

In addition to its efforts in the area of litigation, WBASNY has an ongoing legislative program to analyze bills pertaining to women and legal matters introduced in the New York State legislature. Through the work of its legislative committee and chapters WBASNY has been instrumental in defeating legislation restricting abortion, passing bills providing protection to women in child custody and support cases, providing access to birth control information and promoting other legislative efforts of importance to women.

STATEMENT OF THE CASE

After seven and one half years as an associate at the large Atlanta law firm of King & Spalding, petitioner Elizabeth Hishon was discharged from her employment as the result of the firm's refusal to admit her to partnership and the consequent implementation of its up-or-out policy. Ms. Hishon promptly initiated this lawsuit, under Title VII of the Civil Rights Act, alleging that her termination and the denial of partnership were both the direct result of the firm's discrimination against her on the basis of sex. The complaint offers numerous examples of alleged sex discrimination in work assignments and other terms and conditions of her employment, in addition to the alleged discrimination with respect to the privilege of being considered for partnership.

All of these allegations must be taken as admitted for purposes of this review because the district court dismissed her complaint for lack of jurisdiction under Title VII. In tone and reasoning the district court's opinion reflects an insensitivity to the employment and civil rights issues involved in the case. The court analogizes the professional partnership relationship to the intimacy of marriage and reasons that the tax-exempt private club exception of §2000e(b) should be judicially expanded to protect all law firms—and, by implication, all other professional partnerships in accounting, architecture, advertising and other fields—from any scrutiny for potential unfair and discriminatory employment practices. The court ignored the commercial and profit-oriented nature of these firms and the time and labor invested by associates striving to earn partnership based on their individual merit.

The Eleventh Circuit's majority opinion affirming the dismissal, although more temperate in tone, nevertheless

persisted in evading the key question emphasized in the dissent by Judge Tjoflat: why should the firing of an employed associate be insulated from Title VII scrutiny just because the law firm waited until partnership decision time to effect the termination?

SUMMARY OF ARGUMENT

The Eleventh Circuit's opinion sanctioning sex discrimination by a group of lawyers organized as a partnership is without precedent. The language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, its legislative history, decisions by other courts and public policy considerations all dictate a contrary ruling.

The statutory language found at §2000e(a) clearly states that partnerships are employers subject to the Act. Section 2000e-2(a) further provides that employees and other individuals have standing to complain about discrimination in the terms, conditions or privileges of their employment or potential employment.

The legislative history of Title VII, in particular the debate surrounding the adoption of the 1972 Amendments, reveals a congressional intent to reach and remove those barriers which have traditionally kept women and minorities out of the professions and other high paying fields. 18 Cong.Rec. 3802, 4817-18.

Other courts that have considered the application of Title VII to partnerships have not hesitated to find that employees of the partnerships are protected by the Act. *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D. N.Y. 1977); *Blank* v. *Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975); *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973) *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

In other cases, courts have looked beyond the designation or "employee" label, and instead have looked to the economic relationship of the parties to determine whether discrimination affected a term, condition or privilege of employment. *Gomez* v. *Alexian Brothers Hospital*, 698 F.2d 1019 (9th Cir. 1983); *Silby Memorial Hospital* v. *Wilson*, 488 F.2d 1338 (D.C. Cir. 1970); *Puntalillo* v. *New Hampshire Racing Commission*, 375 F.Supp. 1089 (D.N.H. 1974); and *Bonilla* v. *Oakland Scavenger Corp.*, ... F.2d ....., 51 U.S.L.W. 2301 (9th Cir. 1982).

The Equal Employment Opportunity Commission filed a brief urging *en banc* review in which it supported Ms. Hishon's postiion. That agency is charged with the administration of Title VII. Its opinion should now be given proper deference. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981).

The Eleventh Circuit's reliance upon *Burke* v. *Friedman*, 556 F.2d 967 (7th Cir. 1977), to justify an exception for partnerships is erroneous for two reasons. First, Ms. Hishon's status as an employee is not at issue. She was not a partner at the time the discriminatory acts took place. Second, the court mistakenly used an aggregate, rather than an entity, analysis of partnership law. It ignored the fact specific holding in *Burke*, and applied that court's analysis to a large business entity, the antithesis of the small aggregate type of partnership considered by *Burke*.

An affirmance of the appellate court will give the public the impression that lawyers will be specifically shielded from the application of discrimination laws; in reality, the decision affects thousands of individuals working in such diverse areas as architecture, accounting, mortgage banking and advertising. That many of these professions have

traditionally discriminated against women and other minorities is beyond doubt. That these discriminatory practices should flourish with judicial sanction, however, is contrary to clear congressional intent and prior admonitions of this Court.

It has been held in prior decisions that courts should not deprive discrimination victims of their legal remedies unless it was clear that Congress, itself, intended to provide an exemption to the Act. *County of Washington* v. *Gunther*, 452 U.S. 161 (1981). Congress created no such exemption for legal partnerships or any other large business entities. This Court should reverse *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982) and remand Ms. Hishon's cause of action to the district court for trial on the merits.

ARGUMENT

I.

STANDARD METHODS OF STATUTORY ANALYSIS, CORRECTLY APPLIED, SUPPORT REVERSAL.

The Eleventh Circuit stated that it based its decision on "consideration of the statutory language of the Act, its legislative history, existing case law, and the particular circumstances of the case at hand," quoting from *Calderon* v. *Martin County*, 639 F.2d 271 (5th Cir. 1981). It is the position of *amici* that a thorough review of these very factors, the statutory language, the legislative history, case law and the facts of this case, supports Ms. Hishon in her assertion that consideration for partner is a condition or privilege of her employment, entitled to the protections offered by Title VII.

A. The Plain Language of the Statute Supports the Application of Title VII to Partnership Decisions.

The Act provides at §2000e-2(a) that:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any *individual* or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (emphasis added)

By using the word individual rather than the specifically defined word "employee," Congress emphasized its intent

to extend the Act's protections beyond the class of persons who are employees. The use of the word individual signals an intention to cover a wider group of people in employment relationships.

Had Congress wished to limit the Act's coverage to applicants for employment and employees only, it could have easily achieved that result by just using those simple words. It did not. Moreover, the only category of individuals who were excluded from the definition of employee are persons elected to public office and their policymaking staff and advisors, §2000e-2(e).

The wording of the statute shows specific congressional intent to include partnerships as employers at §2000e(a). Partnerships *per se* are not within the specific exclusions enumerated in the Act. Only private clubs which qualify for tax exemption, pursuant to §501(c) of the Internal Revenue Code, and the religious institution exception are exempted due to their associational and privacy concerns. No profit making business organizations were granted exclusions, which is evidence of congressional intent not to grant profit making concerns an "associational" or "voluntary joinder" exemption, such as provided King & Spalding by the Eleventh Circuit.

B. The Legislative History Indicates that Congress Intended to Include the Professions in Title VII.

The second established method of statutory construction, examination of legislative history, demonstrates that Congress fully intended Title VII to cover discrimination against women in professional positions. The best insight into the sex discrimination provisions is derived from a review of the record and debate surrounding the 1972 Amendments to Title VII. The House Report statement

of purpose that prefaces the 1972 Amendments, reflects a concern that women were continuing to be relegated to lesser positions despite the enactment of Title VII in 1964. "Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone." H.R. Rep. No. 238, 92d Cong., 2d Session, reprinted in 1972, *U.S. Code Cong. and Ad. News* 2140.

This concern was reiterated in debate by Senator Adlai Stevenson III of Illinois. In his remarks, which clearly equated discrimination based on sex with that based on race or religion, Stevenson emphasized the pernicious character of sex discrimination. He traced the search for women's equal rights to the previous century. "Sex discrimination, especially in employment, is not new. But it is widespread and persistent." 18 Cong. Rec. 4817 (1972).

Stevenson articulated the continuing problems of women workers by citing statistics to show that despite a 75% increase of women in the labor force between 1968 and 1974 "women continue to be relegated to the lower paying positions, largely excluded from the higher paying executive positions, and promoted much slower than men in similar positions." *Id.* The Senator's remarks exhibit a concern not only with discrimination within the professions, but also that discrimination had discouraged the entry of women into these professions:

> The litany of discrimination can continue into a consideration of women in professions in this country. Women presently comprise 3.5 percent of our nation's lawyers, 2 percent of our dentists, and 7 percent of our physicians. The comparable figure for lawyers in

> Denmark is 24 percent and for dentists 70 percent. In Great Britain, 16 percent of the doctors are women, and this figure is 20 percent in Germany and 24 percent in Israel. *Id.* at 4818.

Jacob Javits, the Senator from New York, spoke out against the exclusion of any professionals, and against an exclusionary amendment which proposed to exclude physicians employed by hospitals in particular, by stating:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditch-digging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> * * *
>
> Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them. *Id.* at 3802.

Further proof that Congress intended the professions to be covered by Title VII, is found in the 1972 Amendments extending coverage to school teachers and university professors, originally exempted from the Act.

The legislative history is lucid. In enacting Title VII and the 1972 Amendments, Congress intended to cover all professions and to protect all females in the professions.

and further, to extend protection to executive positions and promotions.

C. The Eleventh Circuit Decision is at Odds with Emerging Lower Court Trends and Authority.

The majority panel in *Hishon* grudgingly conceded that a discriminatory discharge of an associate by a partnership "may" state a cause of action under Title VII—as it must, since there is no principled basis in the statute or the legislative history for concluding that associates are not employees or that partnerships are not employers. The court then proceeded to create a special exclusion for associates who have worked long enough to be considered for partnership and are terminated pursuant to an up-or-out policy.

The majority decison in *Hishon* is directly contrary to *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D. N.Y. 1977), in which the court held that consideration for partnership was an incident of the conditions and privileges of being an associate. Title VII protection has been extended to associates in the other reported decisions in which the issue has been considered. *Blank* v. *Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975); *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. 515 (S.D.N.Y. 1973) *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

In other cases where the employer has denied that the Title VII plaintiff is an employee, courts have refused to become preoccupied with the "employee" label, and instead have looked to the economic relationship of the parties. In *Gomez* v. *Alexian Brothers Hospital*, 698 F.2d 1019 (9th Cir. 1983), the plaintiff, a physician practicing medicine as a professional corporation, was denied a con-

tract to direct the emergency room of the defendant hospital because the corporation had "too many" Hispanic physicians. The court interpreted §2000e-2(a) to provide that an "individual" has standing to maintain a Title VII action where a defendant subject to Title VII interferes with his employment opportunities. The Ninth Circuit specifically found it persuasive that the Act does not use the term employee to define who may bring an action, and therefore injured individuals who do not stand in a direct employer/employee relationship are covered. Other cases have held that a physician or nurse who directly applies for and is denied staff privileges at a hospital has standing to bring a Title VII action, even though the individual patients and *not* the hospitals are the employers, because the acts of the hospital limited the access of the physician or nurse to their employer/patients. *Silby Memorial Hospital* v. *Wilson*, 488 F.2d 1338 (D.C.Cir. 1970); *Pao* v. *Holy Redeemer Hospital*, 547 F.Supp. 484 (E.D.Pa. 1982).

The same result was reached in *Puntalillo* v. *New Hampshire Racing Commission*, 375 F.Supp. 1089 (D.N.H. 1974), where the court found that the Racing Commission's licensing of jockeys controlled the plaintiff's access to employment, and therefore found jurisdiction to apply Title VII. The Ninth Circuit in *Bonilla* v. *Oakland Scavenger Corp.*, ... F.2d ....., 51 U.S.L.W. 2301 (9th Cir. 1982), rejected the assertion made by an employee-owned corporation that its shareholder preference plan for work assignments should be excluded from the purview of Title VII since the Act does not reach the sale of stock. The court held that the shareholder preference plan, which favored those of Italian descent, was a condition of employment as defined by §2000e-2(a).

Thus, the courts have endorsed the rights of individuals to sue under Title VII in a variety of non-employee situa-

tions. Moreover, the cases have interpreted the statutory terms "conditions" and "privileges" of employment quite expansively, in accord with the remedial interest reflected in the legislative history. This is also the approach of the Equal Employment Opportunity Commission ("EEOC"), the reguatory agency charged with responsibility for enforcing Title VII. In the case at bar, the EEOC participated as *amicus* before the Eleventh Circuit in vigorous support of Ms. Hishon.

In questions of statutory construction, the interpretation given the statute by the regulatory agency charged with its administration is entitled to be given great weight. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981); *U.S.* v. *Moore*, 95 U.S. 760 (1898). It is not necessary for the court to find that the agency's construction is the only reasonable one, or even that it is the result the court would have reached. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). Although the Eleventh Circuit chose to disregard the EEOC's interpretation in this case, the Fifth Circuit, its predecessor, has expressly deferred to the EEOC's interpretation of Title VII in other cases. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).

In its *amicus* brief filed in support of an *en banc* reconsideration of this case before the Eleventh Circuit, the EEOC opposed the majority panel's analysis and conclusions:

> Ms. Hishon was indisputably the firm's employee, protected under Title VII from discrimination in the terms, conditions, or privileges of employment, §703 (a)(1), 42 U.S.C. §2000e 2(a)(1), and the discriminatory deprivation of employment opportunities, §703

(a)(2), 42 U.S.C. §2000e(a)(2). EEOC brief for Plaintiff-Appellant, *Hishon v. King & Spalding*, No. 80-9021 (11th Cir. 1982)

Implicitly, the EEOC recognized that promotion to partner was the most crucial privilege of employment as an associate at King & Spalding. This Court should give due weight to the Equal Employment Opportunity Commission's conclusion that Ms. Hishon was protected by Title VII from discrimination in the conditions or privileges of her employment, including by implication the partnership privilege.

D. The Analysis of Burke v. Friedman Was Misapplied By The Eleventh Circuit.

Against the backdrop of numerous contrary decisions, the Eleventh Circuit sought comfort from *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977), in rejecting Ms. Hishon's claims. But *Burke* is distinguishable in two crucial grounds. First, the issue was whether someone already a partner in a small business should be counted as an employee for purposes of satisfying the minimum size test of Title VII. In the present case, of course, the minimum size is manifestly satisfied without counting partners as employees. By contrast, the issue here is whether an employee who is *not a partner* is protected by Title VII from discrimination in the conditions and privileges of her *employment*. This is *not* a case of a partner claiming discrimination on the part of his or her other partners as to the terms of their partnership relationship. This Court is not being called upon to determine whether Title VII applies to such suits by partners.

The rationale of *Burke* is inapplicable here for a second reason. In determining that the three partners could not

be counted as employees to bring the partnership within ambit of the court's jurisdiction, the Seventh Circuit applied the common law aggregate theory of partnership to the jurisdictional requirement of §2000e(a). While this application of the aggregate theory of partnership may arguably have been an appropriate framework for analyzing the character of a small partnership, the entity theory, whereby the firm itself is regarded as having its own existence, is more appropriate for determining the rights and obligations of larger partnerships. Professor A. Bromberg, in his treatise *Crane & Bromberg on Partnership*, extensively reviews the aggregate-entity dichotomy and states at page 19:

> A two or three-man firm, informally run by the partners in their own names with little or no help, and with a good deal of casual use of individual assets for firm business (or firm funds for personal affairs) does not look much like an entity in fact. By contrast, no corporation is more entity-like than a large law firm or accounting firm which has been going for generations often under the name of someone long since dead, with dozens or hundreds of partners (of whom only a handful, as managing partners or an executive committee, make major decisions), and perhaps as many offices and more employees. These extremes suggest one reason why no consistent theory has evolved; some partnerships are much more like entities than others.

The facts of the case at bar compel a finding that King & Spalding's position concerning the status of a partner is not at all conducive to the application of the aggregate theory of partnership. That the courts may reach an opposite result in a different legal context and when presented with a fact situation such as *Burke* v. *Friedman*, *supra*, is simply an example of the fact specific basis for the application of the entity or aggregate theories.

II.

PUBLIC POLICY MANDATES PROTECTION OF PROFESSIONALS EMPLOYED BY PARTNERSHIPS.

The Eleventh Circuit's conclusion that partnerships are excluded from Title VII constraints is not merely incorrect, it is contrary to our nation's public policy forbidding discrimination in the workplace. When confronted with cases questioning the scope of Title VII, this Court has specifically admonished courts to "avoid interpretations . . . that deprive victims of discrimination of a remedy, without clear Congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981). The panel majority in *Hishon* ignored this clear instruction and erroneously read exemptions for higher level positions into the Act. *See*, Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982).

To bring law partnerships into exempt status the court of appeals relied heavily on the concept of voluntary association. But law firms are not non-profit social clubs; the of appeals relied heavily on the concept of voluntary asso- largest are multimillion dollar commercial enterprises. That profit making purpose of the partnership destroys the analogy between it and the private club. Note, *Applicability of Federal Anti-Discrimination Legislation to the Selection of a Law Partner*, 76 Mich.L.Rev. 282, 311 (1977); *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974). As this Court has recognized "the real life fact [is] that lawyers earn their livelihood at the bar." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 368 (1976). As noted in *Bates*, "[w]e all know that law offices are big businesses, that they may have billion dollar or million dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them non-commercial is sanctimonious humbug." *Id.* at n. 19.

In *Bates*, this Court observed that the legal profession's prohibition on advertising "originated as a rule of etiquette and not as a rule of ethics . . . . But habit and tradition are not in themselves an adequate answer to a constitutional challenge . . . . The belief that lawyers are somehow "above" trade has become an anachronism." *Id.* at 371-72. So, too, has the time come for the bulwarks of the legal establishment—the firms—to recognize that they are not entitled to discriminate in the employment opportunities provided to their associates on the basis of sex, race, religion or national origin.

Reversal of the decision below will not remove a law firm's discretion to select partners deemed suitable for the firms particular needs by virtue of individual skills and qualifications. It will assure that no individual will have his or her professional career destroyed because of sex, race, religion or national origin.

III.

THE EFFECTS OF PERMITTING SEX DISCRIMINATION WOULD BE PERNICIOUS AND PERVASIVE.

"Women's activities and responsibilities are increasing and expanding. . . . The presence of women in business, in the professions, in government, and indeed in all walks of life . . . is apparent and a proper subject of judicial notice." *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975). Thus this Court recognized the advancing position of women in society, and now faces a decision which profoundly affects the full participation of women in professional life. If the Eleventh Circuit decision is allowed to stand, its effect would far exceed the limits of the instant case. Not only would Elizabeth Hishon be denied a remedy, but countless women and minorities could easily be ex-

cluded from a major, powerful segment of the professional population.

Congress and the courts have long supported the rights of women and minorities to be admitted to professional schools, and to be interviewed for professional positions, on an equal basis with majority males. Educational Amendments of 1980, Title IX, 20 U.S.C. §§1134 *et seq.* (Supp. IV 1980). It would be cruel and ironic to support women's entry into the professions only to permit employers to discriminate against them as they reach the final rung of the career ladder—partnership. Yet the effect of the Eleventh Circuit decision is precisely that.

The obvious long-term goal of any law student or lawyer interviewing for an associate position with a firm such as King & Spalding, is the chance to rise to the top of the firm and share in its decisonmaking and profits. J. Stewart, *The Partners* (1983); C. Epstein, *Women in Law* (1981).

A survey of the 119 Illinois law firms in 1982, with 15 or more attorneys, discloses out of 5738 total attorneys and 2892 total partners only 102, or 3.54%, of partners were women. Even more startling, 68 of the 119 firms have no women partners, 30 have only one woman partner, 9 firms have 2 women partners, 11 firms have from 3 to 5 women partners and one firm, with 163 attorneys and 87 partners, has 12 women partners.[1] The obvious conclusion drawn from these figures is that well over half the law firms in Illinois, with 15 or more attorneys, have *no* women involved in high-level decisonmaking.

---

[1] These statistics were derived by counting the number of attorneys and partners listed in *Sullivan's Law Directory for the State of Illinois, 1982-83* (1982).

For any business entity to take advantage of the gap in Title VII coverage opened by the lower court it need only be organized, or be willing to organize, as a partnership. Not only are law firms traditionally partnerships, but so are accounting practices, architecture firms, medical practices, mortgage banking companies, advertising agencies and brokerage houses. They also share a reluctance to admit women to their higher ranks. There were about 7,000 partners nationwide in the Big 8 accounting firms in 1981. Wayne, *The Year of the Accountant*, New York Times, Business Section, Jan. 3, 1982. Of these 52 were women.[2] The architectural firm of Skidmore, Owens and Merrill, with 1500 architects in 9 offices, admitted its first and only woman general partner in the firm's 46 year existence on October 1, 1982. Block, *Women Build Own Stature as Architects*, Lerner Booster, March 2, 1983 at 1; *SOM Names Dianne Legge Lohan First Woman General Partner*, 4 Chicago Women in Architecture, June, 1982, at 2.

Judicial policies that discourage the application of Title VII to partnership and promotional decisions constitute judicial abdication inconsistent with congressional intent. The spector of this practice continuing to flourish with the *imprimatur* of Supreme Court approval is abhorrent. If Title VII cannot address invidious practices in regard to partnership decisions, there will be no remedy to prevent a large segment of American business from operating outside the Act, a result certainly not envisioned by Congress. Courts that promote an exception for legal partnerships do a disservice to the profession by attempting to

---

[2] This figure is the result of a telephone survey performed in 1983 by the Chicago Society of Women Certified Public Accountants.

carve a special protected niche for their colleagues and setting professional partnerships at odds with every other type of American business, government, educational and charitable institution, and indeed, with the public interest.

CONCLUSION

For all the reasons stated herein, the Women's Bar Associations of Illinois and New York request that this Court reverse the decision of the Eleventh Circuit.

Respectfully submitted,

Paddy Harris McNamara
Susan N. Sekuler
Jacqueline S. Lustig
33 N. Dearborn
Chicago, Illinois 60602
312-630-0075

May 6, 1983